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No. 84-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

KENNETH MOSES LOUD HAWK, *et al.*,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF FOR RESPONDENT ON THE MERITS

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QUESTIONS PRESENTED

1. Whether a *per se* rule should be adopted allowing pretrial criminal appeals to consume a limitless amount of time, thereby insuring that even clearly inappropriate appellate delay cannot impact a defendant's right to a speedy trial.

2. Whether the Sixth Amendment's Speedy Trial Clause protects a defendant-appellee during a pretrial appeal pursued by the Government as part of its effort to try, convict and incarcerate that defendant.

3. Whether every time a suppression order is entered against the Government with respect to only part of a criminal case, the Government can contumaciously refuse to proceed to trial on the unaffected counts after being denied a stay by both the trial and appellate benches, and suffer no consequence under *Barker* v. *Wingo* for such recalcitrance.

4. Whether the appellate court erred in upholding the District Court's use of discretion in applying the analysis of *Barker* v. *Wingo* to the unique facts of this decade-old case and therein finding a clear speedy trial violation.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals affirming the dismissal of the indictment for violation of respondents' Sixth Amendment right to a speedy trial (Pet. App. 1a-25a) is reported at 741 F.2d 1184 (1984). The opinion of the District Court (J. Redden) dismissing the indictment on speedy trial grounds (Pet. App. 119a-138a) is reported at 564 F.Supp. 691 (D.C. Or., 1983).

The Court of Appeal's opinion addressing respondents' and petitioner's respective "vindictive prosecution" appeals (Pet. App. 26a-35a) is reported at 682 F.2d 841 (1982). The District Court's Amended Order (J. Redden) on the vindictive prosecution claims (Pet. App. 139a-143a) is unreported (1980).

The *en banc* opinion of the Court of Appeals reversing the District Court's suppression order and remanding the case to the District Court (Pet. App. 36a-87a) is reported at 628 F.2d 1139 (1979). The panel opinion (Pet. App. 88a-118a) is unreported (1977). The District Court's (J. Belloni) bench ruling dismissing the indictment for unnecessary delay under F.R.Cr.P. 48(b) (Pet. App. 149a-151a, J.A. 169-170) and its suppression order (Pet. App. 152a-157a) are unreported (1976).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was issued on August 30, 1984, and a petition for rehearing was denied on January 8, 1985. (The mandate issued January 16, 1985.) A petition for a writ of certiorari was filed on February 26, 1985, and was granted on April 15, 1985.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

This continuously prosecuted criminal case began on November 14, 1975. Respondents first demanded a speedy trial

months before this country's Bicentennial celebration. No trial has yet been held.

On November 13, 1975 the FBI issued a teletype describing two vehicles in which it believed unidentified federal fugitives were traveling. (RT 5/9/78 pps. 64-65) The next day a motor home matching that description was stopped in the eastern Oregon desert town of Ontario by Oregon State Trooper Griffiths. (RT 5/9/78, pps. 53-54) Inside were respondent KaMook Banks, former co-defendants Anna Mae Aquash and Leonard Peltier[1], and at least one other unknown person. (RT 5/9/78 pps. 56, 64; RT 6/23/80 p. 110)[2]

The Trooper approached the motor home, and asked all the occupants to step outside. Respondent KaMook Banks, her infant child, Peltier and Aquash emerged. Griffiths asked if anyone was still inside. He was told "no." At that same instant the vehicle sped forward. Peltier took the opportunity to jump over a fence and escape into the night. The motor home was later found a half mile down the highway with no one inside. (RT 6/23/80 pps. 110-111, 113)[3]

---

[1] Leonard Peltier's case was severed from respondents', and subsequently dismissed on motion of petitioner. (CR R-186.J.A. 70) Anna Mae Aquash is deceased. (CR 129, J.A. 111)

[2] The record contains two transcripts dated June 23, 1980, each beginning at page 1. The one captioned "Transcript of Proceedings before the testimony of Sidney Rubin" will be referred to as "RT 6/23/80a."

In 1978, the District Court adopted a "new" numbering system. In effect, the numbering of documents was begun anew, with an "R" preceeding the document number. However, some documents from the mid 1970s are more easily referenced by using the old system that gave each page a separate number. These documents will be referred to by the notation "FCR" for "former clerk's record."

[3] Petitioner's theory is that Dennis Banks was the driver of the motor home. It bases this conclusion on the fact that his wife was in that vehicle, as was his briefcase, and that a few fingerprints alleged to be his were found on such items as a pickle jar. (RT 6/17/80. p. 49)

As Trooper Griffiths was stopping the motor home, a white station wagon pulled off the highway and parked a distance back from the larger vehicle. Respondents Kenneth Moses Loud Hawk and Russ James Redner, the occupants of that vehicle, were arrested and taken to the city jail with Ms. Banks and Ms. Aquash. (RT 5/9/78 p. 86)

The vehicles were searched pursuant to state and federal search warrants. Found fully secreted in various parts of the motor home were blasting caps, pocket watches, and eight firearms which allegedly had their serial numbers obliterated. (CR R-160, J.A. 69; RT 6/17/80, pps. 81-82) A search of the station wagon produced a quantity of a substance which the Government contends was dynamite. This evidence was subsequently destroyed by state officials, despite the fact that it could easily have been stored in nearby magazines.[4]

All respondents were indicted on November 25, 1975 and charged with possessing explosives and firearms. (CR 1, J.A. 38) Trial was set for the week of February 9, 1976. (CR 6, J.A. 39)

The Government does not allege that his fingerprints were found on any of the items charged in the indictment, or on any other items that would indicate a "recent" presence in the motor home.

Fingerprint analysis identified others as having been in the motor home as well. More to the point, authorities had conducted "throw downs" along the major route in the Oregon desert. No one identified Dennis Banks; however, others not charged were identified as travelling in the motor home on November 14, 1975. See CR R-160, RT 6/17/80 pps. 115-116, CR R-242, CR R-216, RT 3/9/83 pps. 30, 48-49.

[4] The FBI was fully aware that the evidence was going to be destroyed, but did nothing to stop the destruction. (See RT 3/22/76 pps. 9, 50, 51; RT 5/9/78 pps. 72, 88, 91, 125, 131, 153, 166-169, 172, 211-212; RT 6/17/80 pps. 30, 67.) Judge Belloni found that the evidence was "on a conveyer belt to be destroyed. And one word by a member of the FBI would have stopped that conveyer belt." (RT 5/19/78 p. 122)

A superceding indictment was returned on December 22, 1975. (J.A. 39) Two days later respondents filed a motion to suppress evidence. They alleged a violation of their due process rights from the Government's unilateral decision to deny them access to the very same items they were charged with possessing.[5] Respondents also asserted prejudice from the burning of plastic and cardboard containers in which the destroyed evidence was found. No fingerprint analysis had been conducted on these items. (CR 17, J.A. 39)

On January 21, 1976 the trial date was continued for one month on motion of respondents Redner and Loud Hawk to March 8, 1976. (CR 36, J.A. 41) The paramount reason for the continuance was problems with defense investigation.[6]

On January 26, 1976, respondent Dennis Banks was arrested in California. All parties felt that one joint trial with Mr. Banks would be desirable, even if the March 8 trial date was unrealistic. (RT 2/5/76, pps. 42-48) On February 18, 1976, the trial date was reset to May 12, 1976. (CR 62, J.A. 46)

Judge Belloni granted the respondents' suppression motion on March 31, 1976, and suppressed "all evidence, tangible and intangible, relating to" alleged dynamite. (Pet. App. 157a, J.A. 48) On April 19, 1976 the Government filed a notice of appeal from that order, and moved the District Court for a continuance of the trial date. (CR 115, J.A. 49) The request for delay was summarily denied. (CR 120, J.A. 50) The Government then made a similar plea to the Ninth Circuit Court of Appeals on April 23, 1976. (J.A. 1) Respondents immediately filed an opposition to that request, demanding observance of their right to a speedy trial, and outlining the prejudice that would be suffered if a continuance were granted. (FCR 1086, J.A. 1, 162-168) The Government's request for stay was denied by the appellate court on April 26, 1976.

[5] Testimony from the FBI's chemist and from explosives expert McCreary cast substantial doubt on the indictment's assertion that the substance destroyed was capable of explosion. (RT 3/22/76 pps. 61, 64; RT 5/9-10/78 p. 223; CR R-26; Pet. App. 37a-40a; J.A. 174)

[6] The United States Attorney's Office had instructed all "its" witnesses to refrain from talking with anyone associated with the defense. Judge Belloni ultimately ORDERED government counsel to "notify those [eastern Oregon and western Idaho state and local] officers whom he asked not to talk to defense counsel that his prohibition no longer applies." (RT 3/22/76, pps. 78, 83-90; CR 92, J.A. 48)

On April 26, 1976, the Government informed the district court that it"[could not] proceed without the [suppressed evidence]," despite the fact that the suppressed evidence had nothing to do with the gun counts. (RT 4/26/76, p. 5) Respondents again insisted on proceeding to trial on May 12th. (RT 4/26/76, p. 12, CR 127)

On May 4, 1976, the Government again asked the District Court for a continuance, at which time the Government conceded that respondents "desire the case to be tried at the earliest practicable opportunity." (CR 136, J.A. 51)

On May 11, 1975, the Government admitted that it was willing to suffer a dismissal with prejudice for refusing to proceed to trial. (CR 140) (J.A. 51)

On May 12, 1976, the case was called for trial. All respondents were ready:

> MR. ROBERTS:
>
> Our defendants' rights under the Speedy Trial Act as well as the Constitution of the United States are being flagrantly violated by the dilatory tactics of the Government in this case.
>
> We are ready for trial. We demand our trial; we demand our day in court now. We want our total and full exoneration by a jury. This is the day set by the Court many months ago for trial. We are ready and need our trial today.

The Government refused to proceed. Judge Belloni dismissed the case with prejudice, saying:

> I am ready to try the case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss the case against these four defendants.
>
> Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly, it's the fault of the Government.

(RT 5/12/76 pps. 4-5) (J.A. 169)

Before respondents, their families, their supporters, and the press, the Government verbally contested the District Court's jurisdiction to dismiss the case, and filed its notice of appeal in open court. (CR 142, J.A. 52, 53; RT 5/12/76 pps. 9-12; Pet. App. 122a-123a, fn.2; J.A. 169-170)

During that hearing the Government asked the Court to impose release restrictions on respondents during its appeal of the dismissal. It also requested the Court continue the vitality of its subpoenas. (RT 5/12/76 pps. 6-8, 9-10; CR 149A; J.A. 53)[7]

The consolidated and expedited appeals were argued and submitted on October 15, 1976. (Pet. App. 123a) A divided panel affirmed on July 26, 1977. (Pet. App. 88a-118a)

The Government's petition for rehearing *en banc* was granted on October 17, 1977. (J.A. 3) (Pet. App. at 123a) On March 6, 1978, the Court of Appeals (without giving up jurisdiction of the case) remanded to the District Court for an

[7] During the course of the May 12th hearing, the Government also frankly admitted that it did not need the suppressed evidence to go forward on the unrelated counts. See RT 5/12/76 pps. 6, 8-9, 10, 13-16.

evidentiary hearing.[8] Judge Belloni held that hearing on May 9 and 10, 1978.[9] The government's motion for an extension of time until July 14, 1978, for filing its proposed findings of fact was granted. (Pet. App. 123a) The District Court issued its Findings of Fact on August 23, 1978. (J.A. 171-174)

The *en banc* Court issued its opinion on August 7, 1979 (*id.* at 36a-87a), reversing the suppression order and reinstating the dynamite counts.[10] The Court found that the Government's refusal to proceed to trial on the non-dynamite counts was totally unjustified and constituted unnecessary delay. (Pet. App. 60a) Although dismissal of those counts was entirely proper, the Court reversed the "with prejudice" aspect. Even though the Government knew it was going to suffer a dismissal, the Court held that forewarning of the dismissal sanction must come from the Court to the Government, rather than the other way around. (Pet. App. 61a)

Respondents' petition for rehearing with suggestion for rehearing *en banc*, filed August 17, 1979, was denied October 1, 1979 (J.A. 6); their Petition for Certiorari was likewise denied March 3, 1980. The Mandate was received in the District Court on March 20, 1980. (CR R-30)

On May 12, 1980, Judge Redden ruled that if the Government wished to proceed with the dismissed counts, a new indictment would be necessary. (RT 5/12/80 p. 7) Although the Govern-

[8] Judge Ely dissented from the remand order, referring to it as a "wasteful, futile, and unnecessary burden." Judge Choy also dissented from the order. (J.A. 4)

[9] Respondents' presence was ORDERED at the remand hearing, unless they filed waivers of appearance. (CR R-3, CR R-5, CR R-7, CR R-11, CR R-15)

[10] Judge Ely, in dissent, recorded his "belief that the proceedings in this appeal, with two hearings before the full court, and all the deliberations that followed, reflect a futile exercise." (Pet. App. 86a-87a)

ment had indicated that it was fully satisfied with the December, 1975 indictment, and had requested its reinstatement, it brought forth a new indictment with increased charges. (Pet. App. 140a; RT 4/14/80 pps. 5-7, 21-22) Motions to dismiss for vindictive prosecution were filed. Respondents' motions charged that the Government was retaliating for their assertion of certain rights. Prominent among those asserted rights was the demand for a speedy trial. (CR R-97, J.A. 63)

Judge Redden found that the circumstances surrounding the bringing of the 1980 indictment created an appearance of vindictiveness, but that the Government had dispelled that appearance except as to KaMook Banks, and accordingly ordered the indictment dismissed with prejudice for her on August 12, 1980. (CR R-120, CR R-122, J.A. 66)[11]

Both sides appealed Judge Redden's Order. Notices were filed in August and early September, 1980.[12] The appeals, classified "expedited" pursuant to Ninth Circuit Rule 20, were consolidated. (J.A. 14) Respondents Dennis Banks, Redner and Loud Hawk filed their opening brief on October 15, 1980, and the Government filed its brief on November 3, 1980. The case was argued and submitted on January 7, 1981.

On July 29, 1982, the Court of Appeals reversed the dismissal of the indictment as to KaMook Banks. It also dismissed the appeal of the other respondents under authority of *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 102 S. Ct.

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[11] Arguments on other motions were also heard in the District Court after remand. Some of those motions had been left unresolved on May 12, 1976, when the Government refused to proceed to trial and appealed Judge Belloni's resulting dismissal order. All parties treated those motions as having been "pending in the District Court from December, 1975." See: Government Brief before 9th Circuit at page 39. (J.A. 34)

[12] Respondents Dennis Banks, Redner and Loud Hawk took their appeal on the authority and reasoning of *United States* v. *Burt*, 619 F.2d 831 (9th Cir., 1980) and *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir., 1980).

3081, 73 L.Ed.2d 754 (1982). Respondents' petitions for rehearing and for certiorari were denied on October 5, 1982, and January 10, 1983, respectively (459 U.S. 1117).[13] The Mandate of the Court of Appeals issued on January 31, 1983. (Pet. App. 5a)

Trial was set to begin on April 11, 1983, but was reset to May 3, 1983, at the request of the Government, and over the

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[13] Respondent KaMook Banks filed her Petition for Certiorari asserting that the facts of her case were clearly distinguishable from those of *United States* v. *Goodwin*, 102 S.Ct. 2485 (1982). (This Court concluded in *Goodwin* that a prosecutor should not be manacled to an initial charging decision, and that retaliation for an assertion of non-routine rights was more likely after appeal because a successful appeal required the Government to do over what it thought it had already done correctly. However, the vindictive-appearing indictment in this case was the fourth charging instrument, issued five years into this prosecution. Furthermore, it was brought after an appeal and a successful defense assertion that required the Government to seek a new indictment after it protested that it was completely content with the superceded one.)

The remaining respondents filed their petitition because KaMook Banks had filed hers. They feared that a forced severance of the cases would allow her to create the law of this case before this Court, where they could not participate. The result would have been not only a deprivation of their appellate rights, but also a needless waste of judicial, governmental and defense resources. (As in 1976, these indigent defendants did not want their resources [as well as those of their families, supporters, and volunteer lawyers] further taxed by the need to defend two separate trials.) (See J.A. 162-164) Their claim was based on the holding of *Cohen* v. *Beneficial Industrial Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and the line of this Court's cases criticizing piecemeal disposition of cases on appeal (J.A. 19)

While their Petitions for Certiorari were pending before this Court, all respondents were busily preparing for trial. *They were ready to proceed to trial within a short time after the return of the mandate; the Government was not.* (CR R-197 J.A. 71; RT 3/9/83 pps. 2-18)

vociferous objection of respondents. (See RT 3/9/83 pps. 8-9) Two additional continuances were on the Court's own motion. Respondents objected to each continuance. (Pet. App. 125a)

On May 20, 1983, the District Court again dismissed the indictment, finding that respondents' rights to a Speedy Trial under the Sixth Amendment and to Due Process under the Fifth Amendment were violated by the delay. The Government filed its notice of appeal on June 17, 1983. Again, the appeal was "expedited." (CR R-271)

After requesting an extension of time, the Government filed its opening brief on August 16, 1983. (J.A. 33, 35) Respondents submitted their brief on September 1, 1983. Argument was heard on January 4, 1984, and the Court of Appeals affirmed on August 30, 1984. (Pet. App. 1a-25a)

The Court of Appeals applied the four-prong balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (length of delay, reason for delay, assertion of right and prejudice) to the unique facts of this case, and upheld the District Court, finding that respondents had been denied their right to a speedy trial.

The Government filed a Petition for Reconsideration, which was denied on January 8, 1985. With no Motion to Stay Mandate having been filed, the Mandate issued on January 16, 1985.[14] The Government filed its Petition for a Writ of Certiorari on February 26, 1985. The Writ was granted by this Court on April 15, 1985.

SUMMARY OF ARGUMENT

This criminal case has been pending in the federal courts, without interruption, since the fall of 1975. Respondents have

[14] Respondents' argument that this case is now moot is presented in their Brief in Opposition at pages eighteen (18) through twenty (20). The argument is predicated on the fact that petitioner willingly let the mandate of dismissal issue.

had no trial. They have demanded a speedy trial since early 1976.

The antique nature of this case is explained by two facts. First, the Government refused to proceed to trial in May, 1976. It did so despite respondents' demand for a speedy trial, and despite the orders of the District and Circuit Courts denying motions for a continuance. Its reason for violating these orders—a desire to appeal the suppression of evidence not material to two counts of the indictment—was totally unjustified. Every court that has reviewed the Government's refusal to go to trial in 1976 has found the delay resulting therefrom "wholly unnecessary." (Pet. App. 3a-4a, 29a-30a, 60a, 122a, 150a)

Second, the Ninth Circuit took an unconscionably long time to decide the two interlocutory appeals in this case. Over six years was consumed awaiting decision of two appeals.

The advanced age of this case, the inappropriate delay in the appellate process, the Government's improper refusal to proceed to trial, respondents' strong demands for a speedy trial, and the prejudice suffered from this extensive pretrial delay compelled both the District Court and the Court of Appeals to find a violation of the Speedy Trial Clause.

The Sixth Amendment enshrines the right to a trial without lengthy delay. Petitioner seeks to exempt all pretrial appellate delay from the balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972). Alternatively, it seeks to skew the *Barker* test so that such delay will always be constitutionally inoffensive, regardless of its duration or its purported justification.

A. The Speedy Trial Clause guarantees a trial without undue delay to any citizen accused of crime by the Government. No part of the Government can be exempted from this requirement without eviscerating the Sixth Amendment. Appellate courts are part of the Government.

Petitioner's assertion that appellate courts are incapable of acting with sufficient dispatch to conform to the requirements of the Sixth Amendment is incorrect as a matter of fact, and frightening as a proposition of law. Constitutional requirements are not to be avoided simply because they may require some effort to achieve.

The balancing test of *Barker* v. *Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972) is well designed for considering pretrial appellate delay. If the Government or the defendant appeals when there is no right to do so, the resulting delay will be weighed accordingly in the balance. On the other hand, each side to a lawsuit must expect and tolerate reasonable delays from the proper assertion of rights by either party. It is when that appropriate and expected delay becomes too long to be justified by the reason for the delay that the right to a speedy trial may be violated. Delay is no less harmful to the defendant or to society simply because it arises from appellate processes.

B. Despite the technical dismissals in this case, "the government has not taken a single step * * * to indicate in any way that it is abandoning the prosecution." (Pet. Reply Memo. 4) Nevertheless, the Government wants this Court to exempt this prosecution from the clear language of the Sixth Amendment, which applies to "all criminal prosecutions." Petitioner's argument requires that it grossly contort the holding of *United States* v. *MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982).

The Sixth Amendment protects a defendant in an ongoing Government appeal pursued by the Government as part of its effort to try, convict, and incarcerate that defendant. In this circumstance no charges are dropped in good faith to allow further review and investigation. Rather, the executive is vehemently pursuing its case; it is formally, publicly and actively seeking trial of its accusations. During the technical dismissal, defendants-appellees are not only suffering the debilities of someone who is a known suspect, but also those of a formally accused citizen. Bail provisions apply (18 U.S.C.

§ 3143 [c]), and can be reconsidered at any time. The defendants remain subject to the supervisory powers of the District Court throughout the appeal. They may be required to litigate motions that presuppose a future trial (e.g., motions to continue subpoenas and for despositions of government witnesses). They will also be required to appear if a remand for an evidentiary hearing is ordered (as occurred in *Loud Hawk* in 1978).

Furthermore, they remain listed as "defendants" in an ongoing and public criminal proceeding. Lawyers must be appointed if the defendants are indigent (18 U.S.C. § 3006A). Additionally, the statute of limitations provides no protection from unlimited delay. As the vitality of the executive's public accusation and the disabilities imposed by law remain during an appeal of an involuntary dismissal, the Sixth Amendment applies.

C. Delay from a Government appeal of an involuntary dismissal cannot be exempted from the scrutiny of the Speedy Trial Clause. The Government would be rewarded for creating unnecessary delay and defendants punished for asserting their right to a speedy trial.

When this case was set for trial in May of 1976, the Government sought a continuance. If respondents had desired to take advantage of this golden opportunity for delay, they would have acquiesced in that request. The case would not have been dismissed, and respondents would have enjoyed the protection of the Sixth Amendment during the Government's appeal of the suppression order.

However, respondents vehemently opposed the Government's request for a continuance. They demanded a speedy trial. Both the District Court and the Ninth Circuit Court of Appeals agreed with respondents' strong opposition to the Government's request for delay. Nonetheless, the prosecution violated the courts' orders, and contumaciously refused to proceed to trial. The Government engineered the 1976 dismissal in this case. It should not be rewarded by excluding the

resultant unnecessary delay from the scrutiny of the Speedy Trial Clause.

D. Both the District Court and the Court of Appeals found that the *Barker* balance tipped sharply in respondents' favor. They were correct.

The length of delay before trial in this case is clearly inordinate. No court system requires the better part of a decade to decide two interlocutory appeals.

Much of the delay resulted from the Government's refusal to proceed to trial. That delay was clearly unnecessary, and must weigh heavily against petitioner.

During this delay respondents suffered prejudice to their case as material witnesses died and others no longer had any memory of the events. They also suffered the personal prejudice from the outrageous length of time they have lived with these unresolved accusations.

Respondents have always indicated their strong desire for a speedy trial. They stood ready for trial in May, 1976, objecting to the Government's continuance requests, demanding a speedy trial. They have objected whenever the Government has sought delay after each remand as well.

To remand this case for trial in 1985, finding no speedy trial violation, would be incompatible with the basic design of the Speedy Trial Clause. The Constitution requires that any citizen being prosecuted by the Government shall enjoy a trial without undue delay.

Delay when the prosecution violates court orders to proceed is undue. Delay from years upon years of appellate consideration is undue. Delay of nearly a decade before trial is undue.

ARGUMENT

A. THE GOVERNMENT'S SUGGESTED *PER SE* RULE EXEMPTING ALL PRE-TRIAL APPELLATE DELAY FROM SIXTH AMENDMENT SCRUTINY WOULD EVISCERATE THE RIGHT TO A SPEEDY TRIAL AND PROMOTE UNLIMITED AND UNJUSTIFIABLE JUDICIAL DELAY.

"The law's delay is among the whips and scorns of time." (Hamlet—Act III, S.1, L.73)

The case of *United States of America* v. *Kenneth Moses Loud Hawk, et al.*, has been pending in the federal courts, without interruption, since the fall of 1975. Respondents, charged with crimes by the Government, have had no trial. They have demanded a speedy trial since early 1976.

The bulk of delay (over six years) occurred while jurisdiction of the case was in the Ninth Circuit Court of Appeals. If jurisdiction had been in a trial court for that length of time without a trial, there is no doubt that the case would be dismissed for a violation of speedy trial rights. Petitioner seeks to excuse the delay simply because it occurred in an appellate court.

The right to a speedy trial exists "to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process." *Dickey* v. *Florida*, 398 U.S. 30, 41, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) (J. Brennan, concurring) Delays *can* hurt the accused and *will* harm the judicial system and the public at large. *Barker* v. *Wingo*, 407 U.S. 514, 519-520, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) Delay is no less destructive simply because it derives from appellate processes.

The Government presents two main arguments in its quest to render the Sixth Amendment blind to this particular type of governmental delay. It suggests:

1) That appellate courts are incapable of functioning with sufficient dispatch to meet Sixth Amendment scru-

tiny. Rather than encourage the elimination of unjustifiable delay that may abridge a constitutional right, it seeks a wholesale exemption from Sixth Amendment requirements. (Pet. Brief 26)

2) If this Court feels uncomfortable with a wholesale exemption, petitioner advocates the same result by another proposed rule, to wit: Unlimited delay from every pretrial Government appeal would be appropriate as a matter of law. (Pet. Brief 22-26) Unlimited delay from every pretrial defense appeal would be appropriate as a matter of law. (Pet. Brief 38)

By either formula, acceptance of the Government's argument would mean that a whole tier of the court system would be insulated from the duty imposed upon it by the Sixth Amendment.

1. Setting The Stage: *Barker* v. *Wingo*.

When the Government advocates "not counting" appellate delay, it refers to the operation of the balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).[15]

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[15] *Barker* followed a small number of cases in which this Court examined speedy trial claims. Those examinations identified some of the various components and aspects of the right. However, these cases did not provide a mechanism for determining when the right had been violated.

This Court recognized the need for a standardized approach to the issue, and therefore adopted the balancing test announced in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

For development of the law see: *Beavers* v. *Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed.2d 950 (1905); *Pollard* v. *United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); *United States* v. *Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); *Klopfer* v. *North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Smith* v. *Hooey*, 393 U.S 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *Dickey* v. *Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) and *United States* v. *Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Barker rejected "inflexible approaches" to speedy trial questions. *Moore* v. *Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973) affirmed the mandate that "courts must engage in a difficult and sensitive balancing process."

In balancing the factors, the length of delay is looked at first. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530

Thereafter, the other factors are thrown onto the scales. The "reason for delay" factor can acquire different weights in the balance, depending on the reason asserted. A defendant's demand for a speedy trial is "entitled to strong evidentiary weight." *Id.*, at 531. Prejudice to the person and to the defense is the last factor, although it need not be affirmatively demonstrated for the scales to tip in favor of the defendant. (See *Moore*, *supra*.)

Not every type of delay before trial can result in a potential violation of the Speedy Trial Clause. The Sixth Amendment does not protect a person during a period "before a defendant is indicted, arrested or otherwise officially accused." *MacDonald*, *supra*, 456 U.S. at 6; see also *Marion*, *supra*, 404 U.S. at 313. If charges are dropped and the case returned to investigative status, there is no Sixth Amendment issue. *MacDonald*, *supra*.

When a speedy trial claim is asserted, the trial court must first determine whether the Sixth Amendment applies at all. If it does not, none of the *Barker* factors need be examined, and the concerns of the Due Process Clause of the Fifth Amendment are then considered. If the Sixth Amendment does apply to the delay, then the trial court must determine the length of delay. If the delay is sufficiently long to be presumptively prejudicial, then a full analysis of all factors ensues.

The Government's proposed exemption of all pretrial appellate delay requires that even decades of unwarranted pretrial

procrastination could not impact the Sixth Amendment. With no "countable" delay, no analysis of the remaining *Barker* factors could be triggered.[16]

2. The Government As A Whole Is Responsible For Providing A Speedy Trial.

It is the Government that runs the courts, defines what behavior is illegal, and prosecutes those whom it believes have transgressed the laws. The operation of the criminal justice system is wholly a governmental enterprise. If the Government as a whole is not responsible for providing a speedy trial, a speedy trial will not be provided.[17] (See Justice Brennan's concurring opinion in *Dickey* v. *Florida*, 398 U.S. 30, 51, 52 fn.18, 90 S.Ct. 1564, 26 L.Ed.2d 26 [1970].)

Although the executive branch of government (the police and the prosecutors) is more directly capable of effecting delay based on the peculiarities of its intimate association with any particular case, the legislative and judicial branches are fully capable of creating court delay too. Inefficiency in the judiciary should not be the responsibility of a defendant. The respon-

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[16] The Government's position is that if an individual, having demanded a speedy trial, were incarcerated for twenty-five years while an appellate court "considered" an interlocutory appeal, and during that time he had lost his family, all his witnesses had died, and the Government's witnesses' memories had evaporated (rendering the right of cross-examination meaningless), he could not complain because the interlocutory appeal time did not "count." Using our NewMath, we would close our eyes to twenty-five years of delay before trial of an accused and call it no delay at all. There being no delay, *Barker's* analysis cannot be "triggered."

[17] If the system does not process criminal cases with any speed, civil cases are doomed to saunter through at an even slower pace. This delay has become so pronounced that the prospect of establishments such as "Joe's Rent-A-Court" does not seem too farfetched. See "Companies Offer Alternative to Courts," THE NEW YORK TIMES, May 12, 1985, p.14

sibility for delay occasioned by "reason[s] such as * * * overcrowded courts * * * must rest with the government rather than with the defendant." *Barker* v. *Wingo*, 407 U.S. 514, 531, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)[18]

Petitioner is claiming that the appellate courts should be excused from their obligation to provide a speedy trial because they are allegedly incapable of meeting that obligation. (Pet. Brief 26) It is a frightening proposition that the petitioner presents: when the Government cannot meets its fundamental constitutional obligations, those obligations should be excused as a matter of policy. Constitutional guarantees are not to be so callously regarded, nor so easily avoided. Moreover, respondents do not share petitioner's cynicism. They believe that the appellate system is capable of fulfilling its speedy trial obligation.

As the Court of Appeals for the District of Columbia Circuit said ten years ago:

> If trial courts must expedite their procedures under the Sixth Amendment no reason appears why appellate courts should not be subjected to similar constitutional constraints. The time has come to move seriously toward genuine assurance that appeals will be considered expeditiously.

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[18] For example, in *United States* v. *Fox*, 3 Mon. 512 (1880), Congress failed to appropriate necessary funds for the Marshal to serve process in the Montana territory. Mr. Fox sought and gained his release because he was ready for trial and "the United States being plaintiff in the cases, and charged with the duty of providing the necessary money therefore" violated his speedy trial rights. The court held that "it is not material to inquire for what reason * * * the appropriations of money to enable marshals to serve process failed in Congress. The fact is sufficient for the purpose of this case."

See also *United States* v. *Blanca Perez*, 310 F.Supp 550 (S.D.N.Y., 1970), *United States* v. *Perry*, 353 F.Supp. 1235 (D.C. Cir., 1973), and allcases cited at page 44-45, footnote 46 of Respondents' Brief in Opposition. The cases make it clear that the Government bears the burden of the system's delay even if that delay is beyond its control.

United States v. *Sarvis*, 523 F.2d 1177, 1184 (D.C. Cir., 1975)

Although it "make[s] little sense to require that the appellate process proceed with the speed required of trial courts * * *" (Pet. Brief 26), it is a *non sequitur* to further conclude that it would "make little sense to require the appellate process proceed with the speed required by the Sixth Amendment." (Cert. Pet. 18) It is illogical to advocate the exemption of appellate processes from the requirements of the Sixth Amendment simply because another arm of the judiciary is capable of acting with more dispatch.[19]

[19] "[D]elay has become a prominent characteristic of the American appellate process and a growing threat to the effective administration of justice." *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 Stanford Law Review 676 (1971) "[T]he caseload crisis is more serious in the courts of appeals than in the district courts, or for that matter than in the Supreme Court." Richard A. Posner, *The Federal Courts: Crisis and Reform*, p. x (Harvard University Press, 1985) Undue appellate delay is a fact. Many solutions to the problem have been proposed. (Some reasons for delay may be endemic to the Ninth Circuit. See, e.g., *LawScope: Split 9th Circuit?* 71 ABA Journal 30 [1985]; "*Engine, Engine Number 9. . . .*", California Lawyer, February 1985 p. 39; S. Hrg. 98-860, 98th Congr., 2nd Sess. 1 et seq. [1984]) If the entire appellate process moves more expeditiously, less undue delay will occur on pretrial criminal cases.

Petitioner, in suggesting legislative or rulemaking remedies as alternatives to "constitutional decisionmaking" for appellate delay (Pet. Brief 13) fails to recognize that the problem of pretrial delay is of consititutional dimension. It may well be that the promulgation of some form of "Speedy Appeal Act" or other rule would make it impossible for future pretrial defendants to wait three and four years for appellate disposition. The potential of a legislative remedy does not make a consitutional violation any less real. Certainly the hypothetical prospect of a "Speedy Appeal Act" cannot repeal the Sixth Amendment any more than the passage of the Speedy Trial Act did.

3. Appellate Courts Will Continue To Create Undue Pretrial Delay Until They Realize That The Constitution Mandates That They Provide A Speedy Trial.

This Court must be curious how it is that a criminal case can be continuously before one court or another for ten years and not yet have been to trial. A healthy portion of the delay is explained by the fact that the appellate courts seem nearly oblivious to their obligation to provide a speedy trial.

The Sixth Amendment Speedy Trial Clause does not apply to most criminal appeals, which are proceedings after trial and conviction. In such cases the defendant has already had his or her trial and been sentenced. The presumption of innocence is no longer enjoyed.

The appellate courts treat pretrial cases to which the speedy trial right applies exactly as they treat postconviction cases to which it does not apply. Respondents have been unable to find any rules, guidelines or other evidence to indicate that the appellate courts differentiate a case to which they owe a speedy trial from the vast majority of others they do not. Even the Administrative Office of the United States Courts (whose reputation for gathering statistics on the extreme minutiae of judicial functioning is legend) does not keep *ANY* statistics on pretrial criminal appeals. Such cases are merely lumped together for statistical purposes with all postconviction criminal matters.[20] See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1984, "Analysis of the Workload of the Federal Courts During the Twelve Month Period Ended June 30, 1984."

When a pretrial criminal case is before an appellate court, dispute resolution should be that court's predominant task. Published opinions (in which law is created, altered or explained) are not for the benefit of the pretrial defendants, but for that of future litigants. For the present pretrial litigant, the

[20] As the mythical figure B.T. Quackenbush is reported to have said: "If they don't count it, it doesn't exist."

judgment of the court explained by an unpublished memorandum or order would suffice.[21] "[O]pinion writing is an appellate judge's most time-consuming task."[22] It is an important part of the appellate court's work. However, it is not more important than the conclusive fact that the Constitution guarantees a speedy trial to any person the Government accuses of committing a criminal act.

If the issue in a pretrial case is of sufficient interest to justify a written opinion, appellate courts should nevertheless consider the delay required to craft it. One hazards to guess that the system will, in fact, survive until another case, unaffected by the Sixth Amendment's requirement of a speedy trial, presents itself.

Alternatively, the appellate court could issue an order of sufficient clarity to direct any further proceeding, enter its mandate, and publish an opinion for the benefit of bench and bar at a later date. It may well be that the Ninth Circuit knew it was going to remand for trial, but forced respondents to wait an additional year or more for that trial so that it could polish its opinion. If true, such a practice is unconscionable and irreconcilable with the Government's duty to provide a speedy trial.

Secondly, petitioner suggests that the delay occasioned on the second appeal may have occurred while the appeals court was awaiting this Court's disposition of *United States* v. *Hollywood Motor Car Co.*, *supra*.[23,24] If true, consideration of a pretrial defendant's case was entirely suspended while awaiting a possible pronouncement from this Court. On one hand, it makes unquestionable sense that an appellate court would want to await this Court's latest guidance on the issue before it.

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[21] See, for example, Ninth Circuit Rule 21.

[22] Posner, *supra*, at 12.

[23] Another relevant case before this Court at that time was *United States* v. *Goodwin*, 102 S.Ct. 2485 (1982).

[24] It is also possible that this Court's opinions sped up what might otherwise have been a longer Ninth Circuit deliberation.

However, there will always be the "latest word" in any area of law.

That this Court's opinions are of fundamental importance is a fact. Yet an accused's right to speedy trial is also a fact of fundamental importance. If the appellate court is aware that a potentially relevant opinion from this Court may be coming down the pike, it should not be able to suspend all consideration of a pretrial appeal without informing the litigants of its plan. The parties would then have a real opportunity to either acquiesce in the delay, or object to it.

In sum, appellate courts must become aware of the possible deprivation of a speedy trial that may result from the application of their otherwise routine practices.

4. The Government's Right To A Pretrial Appeal Is Not Of Constitutional Dimension, And Is Not More Fundamental Than The Sixth Amendment.

Should this Court be hesitant to adopt a rule holding that any appellate delay, no matter how extensive and unreasonable, cannot implicate the Sixth Amendment as a matter of law, petitioner urges the same result by a slightly different path.

Most pretrial appeals are Government appeals from orders suppressing material evidence or dismissing an indictment. (See 18 U.S.C. § 3731.) Petitioner argues that all delay during pretrial government appeals cannot impact a defendant's right to a speedy trial. This inflexible standard would apply even if the appeal were improper and judicially determined to be responsible for the creation of unnecessary delay, as in this case. (Pet. App. 60a) This argument is flawed,[25] and was

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[25] The cases that petitioner suggests "toll" the Speedy Trial Clause during a government appeal do not do so.

In *United States* v. *Jackson*, 508 F.2d 1001 (7th Cir., 1975) the District Court found a speedy trial violation, but based that conclusion on "the length of delay between indictments and disposition on the merits *has been* and *will be* unreasonable." 508 F.2d at 1004

rejected by Ninth Circuit Court of Appeals in *Loud Hawk*. (See Pet. App. 10a.)

As the Circuit Court held, the main problem with this argument is that it elevates the Government's appeal rights to a position superior to that of a constitutional guarantee.[26,27] This

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[emphasis added] The Government appealed, asserting that the "question of prospective delay in order to obtain appellate review of an interlocutory order poses a novel issue. * * *"(*USA* v. *Jackson* #74-1488 Brief of the United States p. 10.)

The court of appeals considered the speedy trial claim as of the date of dismissal. (*Id.*, at 1005) This is no more nor less than what the *Loud Hawk* panel did. (Pet. App. 11a, fn. 4) *Jackson* does not stand for the proposition that any and all delay attendant to a Government appeal is proper. That Court was not presented with that issue. Rather, the case holds that delay cannot be prospectively factored into the speedy trial balance.

The post-*Barker* cases cited by the Government clearly support the proposition that time on appeal is to be counted. The Government's contention otherwise is without support. See, e.g., *United States* v. *Herman*, 576 F.2d 1139, 1145 (5th Cir., 1978) ("Most of the delay * * resulted from the government's * * appeal."; "The government therefore submits that the delay attributable to the government is comprised of the period of the interlocutory appeal, government continuances to consider the same, and normal trial scheduling." [*Herman* Brief of Appellee (#77-5455) p. 22]). See also cases cited at pps. 42-43 of Respondents' Brief in Opposition, including those at footnotes 44 and 45 of that document.

[26] The Government's right to appeal is certainly no stronger than its right to try individuals the grand jury charges with crime. Yet, if unconstitutional delay occurs, the charges are dismissed, and no trial is held. *Strunk* v. *United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

[27] Petitioner seeks to completely eviscerate the Sixth Amendment when it engages in the arguments presented in its Brief at pages 19-23.

Its Speedy Trial Act argument is a prime example of "apple and orange" logic. The Constitution is concerned with real and chro-

Court stated in *United States* v. *Wilson*, 420 U.S. 322, 337, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975): "* * * Congress intended to remove all statutory barriers to Governmental appeals and to allow appeals *whenever the Constitution would permit.*" [emphasis added] The Constitution requires a speedy trial.

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nological time; the statute deals with "excludable" and artificially compartmentalized "time." It is sufficient to note that "[c]ompliance with the Speedy Trial Act does not work as a bar to a Sixth Amendment claim." *Herman*, *supra*, 576 F.2d at 1144, fn. 3.

Its second proposition is also flawed. (It argues that as the Government appeals from orders that result from granting of defense motions, all ensuing appellate delay, even if unconscionable, should be excluded from Sixth Amendment scrutiny. Such delay is to be considered the "fault" of the defendant.)

Each party to a lawsuit must expect and tolerate reasonable delay from the exercise of rights that necessarily results in delay. Delay occurs until the court (which owes the defendant a speedy trial) resolves the issue presented. If the delay is reasonable, it can be called "resultant." If it is not reasonable, it does not "result" from the proceedings attendant to the exercise from the right but from something else.

The ruie the Government seeks is that an assertion of a defense totally absolves the Government from its obligation to provide a speedy trial. Clearly, the exercise of a Fourth, Fifth or Sixth Amendment right (or even a statutory right) does not require a speedy trial waiver. Are speedy trials to be provided only to those who tamely roll over and let the Government convict them of crime? Must an accused citizen risk decades of unwarranted pretrial delay as the price of challenging the Government at every stage before surrendering his freedom? That draconian choice is at the heart of the exclusion the Government proposes, and it is anathema to the design of our adversary system. A defendant is entitled to the protection of all the guarantees of the Constitution.

As a corollary to the petitioner's second proposition, it is suggested that only if the defendant wins on the Government's appeal should he or she be entitled to the protection of the Sixth Amendment. (Pet. Brief 22) But it is only when the defendant loses on a pretrial appeal that a case will go to trial. To provide a constitutional protection only in the circumstance where it is not needed is a sham.

5. The Fact That A Defendant Exercises A Right To A Pretrial Appeal Does Not Absolve The Government Of Its Obligation To Provide A Speedy Trial.

In a very narrow set of circumstances, defendants have a right to appeal before trial.[28] *United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978); *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). (Double Jeopardy issues are probably the only non-bail matters a defendant can now appeal pretrial.) Petitioner asserts that the exercise of that limited right is entitled to absolutely no constitutional protection from unlimited delay.[29] (Pet. Brief 35-36).

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[28] Respondents Dennis Banks, Loud Hawk and Redner exercised this right (alleging a vindictive prosecution after the Government "upped the ante" by its 1980 indictment) under the then-existing case law of *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir., 1980) and *United States* v. *Burt*, 619 F.2d 831 (9th Cir., 1980). While their appeal was pending, the holdings of those cases were overruled by this Court in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982).

[29] Petitioner cites a number of cases (Pet. Brief 35-36) for the proposition that, in *Loud Hawk*, the Ninth Circuit "clearly erred in failing to exclude from the **length of delay** the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution." [Emphasis added **this refers to**] It misreads those cases.

For example, in *Hill* v. *Wainwright*, 617 F.2d 375 (5th Cir., 1980) the court considered Hill's claim of a speedy trial deprivation (617 F.2d at 377-378). It determined the **length of delay** as follows:

> "The period of delay starts when a person is accused of a crime and ends when the trial begins. [citing *Marion, supra.*] * * * This petitioner became an accused and his right to a speedy trial was therefore activated on June 26, 1968 when the arrest warrant was issued. Here the delay of nearly three years serves as a "triggering mechanism" to invoke further analysis. [citing *Barker, supra.*]

Under its analysis of the ***reason for delay*** *factor* (617 F.2d at

If a pretrial appeal right is provided to a defendant, it means that the Courts have determined that the issue presented is so fundamental that an opportunity should exist for it to be heard before trial. *Cohen, supra.* As with a motion made to the trial court, a defendant knows that a pretrial appeal will result in delay. However, the Courts owe an obligation to rule within an appropriate period of time. The exercise of a pretrial appeal does not require a waiver of speedy trial rights—it merely means that a valid reason for an appropriate period of delay exists. If unlimited delay were the price a defendant would have to pay for asserting a defense, a chilling effect on the exercise of fundamental rights would result.

Petitioner's *per se* rules would excuse *all* appellate delay, regardless of its justification or length. Appellate delay may result from an improper government appeal (as in *Loud Hawk);* or a proper appeal may consume an unconscionably long period of time (as in *Loud Hawk).* Neither a *de jure* exclusion of all pretrial appellate delay from Sixth Amendment scrutiny, nor a *de facto* exclusion justifying all such delay without regard to its relevant circumstance or duration, is compatible with the Sixth Amendment. Such inflexible rules

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378-379) the court considered how to weigh the delay. It found that the "delay between June 26, 1978 [sic] and February 7, 1969, approximately seven and one-half months, should not be charged against the government since Hill was at large during that period." It further held that "[t]he appellate delay occasioned by petitioner's various legal initiatives should not be attributed to the state."

In other words, the court found that the **length of delay** included all the time during which he stood accused. Under the **reasons for delay** factor ("different weights should be assigned to different reasons"—Barker, supra 407 U.S. at 531) it concluded that that delay could not be attributed to the prosecution.

All the other cases cited by the Government employ a similar analysis. The length of delay *always* includes the time during which an individual is accused.

would not permit the district courts to carry out the examination contemplated in *Barker, supra.*[30]

Appellate courts are not above the Constitution, rather, they are sworn to serve it. They must process pretrial criminal appeals as expeditiously as they can, while still providing due consideration of the narrow issues such appeals present. It is neither reconcilable with the guarantee of a speedy trial nor wise to permit appellate courts to take years, or even decades, to decide matters that should be concluded in a matter of months. Such unconscionable delay can deny a speedy trial just as surely as a similar quantum of delay emanating from any other source.

B. THE SIXTH AMENDMENT'S SPEEDY TRIAL CLAUSE PROTECTS A DEFENDANT-APPELLEE DURING A PRETRIAL APPEAL PURSUED BY THE GOVERNMENT AS PART OF ITS EFFORT TO TRY CONVICT AND INCARCERATE THAT DEFENDANT

The Sixth Amendment provides:

> In **all criminal prosecutions,** the accused shall enjoy the right to a speedy and public trial * * *. [emphasis added]

As petitioner has noted, even though the mandate of the Ninth Circuit upholding the District Court's dismissal in *Loud Hawk* has issued, **"the government has not taken a single step * * * to indicate in any way that it is abandoning the prosecution."** (Pet. Reply Memo. 4) [emphasis added]

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[30] See *Atkins* v. *People of the State of Michigan*, 644 F.2d 543 (6th Cir., 1981), *cert. denied*, 452 U.S. 964; *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich., 1975), *aff'd*, 527 F.2d 612 (6th Cir., 1976), cert. denied, 425 U.S. 944, 96 S.Ct. 1868, 48 L.Ed.2d 188 (1976); *United States* v. *Bailey*, 399 F. Supp. 526 (M.D. Fl., 1975) and *United States* v. *Perry*, 353 F. Supp. 1235 (D.D.C., 1973), *aff'd memo.* (D.C. Cir., December 12, 1973).

That statement is the truth of the matter. The Government is doing everything in its power to try respondents on the charges it successfully asked the grand jury to proffer. However, petitioner argues that this criminal prosecution is not among the class of "all criminal prosecutions" to which the Sixth Amendment applies. In so doing, it not only ignores the clear language of the Sixth Amendment, but also contorts the main authority upon which it relies—*United States* v. *MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). (Pet. Brief 32-33)

This Court held in *MacDonald* that "the Sixth Amendment has no application after the Government, acting in good faith, formally drops charges." *MacDonald, supra*, 456 U.S. at 7. *MacDonald* involved a dropping of charges followed by a period of investigation, not a dismissal over the Government's vigorous objection followed by an appeal designed to overturn that dismissal.

The *Loud Hawk* court correctly concluded that the circumstances in *Loud Hawk* were the antithesis of those confronting Dr. MacDonald. (See Pet. App. 8a-9a)

1. Formal Accusation.

The executive branch of Government is responsible for enforcing the laws. It is the branch that arrests or otherwise accuses a person of criminal conduct. The Government removes the stigma of formal accusation when the executive branch formally drops charges, as it did against Dr. MacDonald. This act publicly announces that it is not presently prepared to prove any illegality.

When a Court dismisses charges over the Government's objection, the veracity of the executive's accusation is not directly addressed. Dismissals of this type occur for reasons that may be wholly extraneous to the Government's belief in the facts of the case. When the Government appeals an involuntary dismissal, that extraordinary act is a public statement

asserting the depth of its belief in its accusation of crime. The Government does not "drop" charges in this setting—it actively continues to pursue them.[31]

2. Actual Restraints.

"After the charges * * * have been dismissed 'a citizen suffers no restraints on his liberty * * *.'" *MacDonald, supra*, 456 U.S. at 9, quoting *Marion, supra*, 404 U.S. at 321.

Respondents suffered many restrictions on their liberty that, by their very definition, could not be suffered by "anyone openly subject to a criminal investigation," but not charged. These disabilities of an accused pretrial defendant not only reaffirm the vitality of the Government's formal accusation, they also exist as an independent basis for providing Sixth Amendment protection.

A. Respondents Were Subject To The Imposition Of Bail Or Incarceration While Their Case Was Technically Dismissed.

When the Government voluntarily dismissed the charges against MacDonald, it willingly dropped all restrictions on his freedom. When the Government suffered a dismissal in this case in 1976, it publically contested the power of the District Court to dismiss, and requested that it impose bail restrictions.

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[31] Petitioner's contention that its inability to try respondents during the dismissal voided respondent's Sixth Amendment rights is unpersuasive. (Pet. Brief 32) It admits that the Sixth Amendment applies when a defendant appeals before trial. (Pet. Brief 32, fn. 20) It is also clear that the Sixth Amendment would apply when the Government appeals a suppression order under 18 U.S.C. § 3731. In both cases the District Court will not try a case. Furthermore, the lack of an immediately triable indictment does not deprive a person of Sixth Amendment protection. *Dillingham* v. *United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975).

When no prosecution is pending, as in *MacDonald*, no bail or other release restriction can be sought. However, during a post-dismissal Government appeal, release restrictions are provided for by statute. 18 U.S.C. § 3143 (c) reads:

> **(c) Release or detention pending appeal by the government.**—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

When a case is "dropped," i.e. voluntarily dismissed, the former defendant is totally free. During their involuntary dismissal, respondents were defined by statue to be identical to any other pretrial defendant. "[When] the Government has taken an appeal from a dismissal of an indictment * * * section 3143 provides that *the defendant is to be treated as any other defendant still awaiting trial.*"[32] U.S. Department of Justice, "Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress" p. 10 (December, 1984); See also S. Rep. 98-225 98th Cong. 1st Sess., 27 (1983).

Furthermore, when the Government obtains a FRCrP 48(a) dismissal, "the prosecution shall thereupon terminate," and thus no release restriction can be imposed. (See Judge Redden's analysis of FRCrP 48(a) at Pet. App. 127a-128a.) In contrast, 18 U.S.C. § 3731 and § 3143 not only authorize bail for

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[32] The Government's ability to seek release restrictions while it appeals a dismissal order is a derivative right. It derives from the fact that a formal accusatory instrument was brought forth and that the Government is actively opposing its dismissal. Until and unless the dismissal is finally affirmed, or the Government abandons its appeal, the prosecution retains the ability to seek bail. This is a fundamental difference between the status of one merely under investigation and not a defendant. *Cf. MacDonald, supra.*

an appellee of an involuntary dismissal, but also refer to the appellee as "person charged with offense" and a "defendant."

In construing Illinois' scheme for setting bail during a government appeal of an involuntary dismissal, the Seventh Circuit noted:

> * * * [T]he language of Ill. Rev. Stat. ch. 110A, § 604, requir[es] the posting of a bond pending appeal if there exists [sic] "compelling reasons" to detain. **The court certainly would not allow bail to be set unless the charges were considered to be still pending until final adjudication.**

United States ex rel. Fitzgerald v. *Jordan*, 747 F.2d 1120, 1124-1125 (7th Cir., 1984) [emphasis added]

B. Respondents were ORDERED to appear for an evidentiary hearing while their case was technically dismissed.

The charges against Dr. MacDonald were "dropped." He had no court appearances to attend until (and unless) the Government decided to bring charges. Respondents were ORDERED to appear at the hearing required by the Ninth Circuit's remand order. Even though they executed waivers of appearance, they nonetheless had to abide by the requirements of F.R.Cr.P. 43.

Other factors further distinguish respondents' position from that of a person merely under investigation, and show the force of the continuing accusation of crime.

3. Respondents Were Listed As Defendants In A Criminal Proceeding While Their Case Was Technically Dismissed.

When Dr. MacDonald's case was dropped by the Government, he no longer was a "defendant" in any proceeding. Not so with respondents. As counsel argued before the District Court:

> "[Respondents] continuously * * * had their names listed as defendants in cases that were pending in front of either this court or the Court of Appeals. * * * [T]o say someone [who] was listed in an appellate proceeding or trial court proceeding is not standing accused of a crime in a case listed as United States v. Somebody as defendants, I think is totally specious. It is [fundamentally different from] a case [which is] dismissed and then at some point later on the Government decides to reindict." (RT 4/29/83 p. 49)

4. Respondents Not Only Needed Counsel, But Were Appointed Counsel While Their Case Was Technically Dismissed.

"**Prudence** obliged [Dr. MacDonald] to retain attorneys at his own expense" during the time his case was dropped by the Government. [emphasis added] *United States* v. *MacDonald*, 531 F.2d 196, 204 (9th Cir., 1976) reversed at *United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) **An ongoing criminal appellate proceeding with respondents named as defendants** obliged respondents to have counsel. While their case was technically "dismissed," attorneys were appointed on their behalf under the Criminal Justice Act, 18 U.S.C. § 3006A. The provisions of that Act apply "[i]n every criminal case in which the defendant is charged with a [crime]." § 3006A(b) The appointment continues "at every stage of the proceedings * * * through appeal. § 3006A(c)

5. Respondents Had To Litigate Motions Regarding The Vitality of Government Subpoenas And Requests For Depositions Of Witnesses While Their Case Was Technically Dismissed.

Unlike the termination of a prosecution that Dr. MacDonald experienced, respondents had to litigate Government post-dismissal motions. Furthermore, these motions were based on the premise that the appellate court might overturn the District Court's dismissal. In 1976 (and again in 1983) the Government moved the District Court to continue the vitality of its subpoenas (the same motion was also made to the Court of Appeals in 1983). (CR 149a, J.A. 53, CR R-274, CR R-278, CR R-281, CR R-289, J.A. 33, 34, 78-79) (In 1983 the prosecution

moved the Court for post-dismissal permission to depose all its witnesses. [CR R-262, J.A. 77])

6. Respondents Were Subject To The Supervisory Power Of The District Court While Their Case Was Technically Dismissed.

Dr. MacDonald's life was not connected to any court while his case was dropped. Respondents have always been subject to the supervisory power of the District Court. In addition to the power relating to release restrictions, respondents have been subject to local rules relating to extrajudicial statements, as the Government admits. (FCR 1030, CR R-172)[33]

7. Respondents Were Not Protected By The Statute Of Limitations While Their Case Was Technically Dismissed.

When a citizen is the recipient of a voluntary dismissal, he or she can count on any applicable statute of limitations to put a time limit to the "public obloquy, stress and anxiety [suffered by one who is] openly subject to a criminal investigation." *MacDonald, supra*, 456 U.S. at 9. If the statutory period runs and the Government has not changed its mind and decided to renew the charges, the matter ends. Respondents have no such protection, both because the Government does not have to change its mind about prosecuting them, and because the statute of limitations does not apply to an ongoing case.[34]

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[33] Six days after the 1976 dismissal the Government wrote to Judge Belloni. The letter explained that "* * * simply because the Indictment has been dismissed does not totally divest the Court of all jurisdiction in the case. For example, although the matter is on appeal, this Court had the right, although it chose not to exercise it, to set conditions of release for the defendants (18 USC 3731), as well as to exercise certain other supervisory power over the parties during the pendency of the appeal; for example, enforcing Local Rule 7 relating to extrajudicial statements, etc." (FCR 1030, CR R-172)

[34] One of the reasons that this Court noted in finding that the North Carolina procedure of *nolle prosequi* violated a defendant's speedy

8. Respondents' Case Was Not "Dropped" For Further Investigation. It Was Actively Prosecuted.

That the circumstances of *Loud Hawk* and *MacDonald* contrast so sharply is partly explained by two basic observations:

1) Dr. MacDonald was not afforded Sixth Amendment protection because his prosecution was dropped so that the Government could further investigate the facts of his case.

2) Kenneth Loud Hawk et al. were afforded Sixth Amendment protection because their prosecution was continuing while a *legal* impediment was being reviewed.

One of the logical underpinnings of *MacDonald* is a policy consideration: The Government should not be forced to keep charges pending against an individual when it may not think it can prove them. Such a consideration plays no part where, as in *Loud Hawk*, the Government opposes dismissal, has completed its investigation, and maintains its publicly announced desire to try and to convict the defendants on the technically dismissed indictment. See *Casenote: MacDonald*, 114 St. Mary's Law Journal 113, 123 (1982).

If the Government succeeds in its legal contentions on appeal, it can proceed under the indictment.[35,36] By contrast, it

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trial right was that it tolled the statute of limitations. *Klopfer* v. *North Carolina*, 386 U.S. 213, 214, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) "These statutes [of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion, supra*, 404 U.S. at 322. See also *United States* v. *Ewell*, 383 U.S. 116, 122, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); *United States* v. *Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

[35] When Judge Belloni dismissed the indictment he stated: "Inasmuch as I have power to do so, this dismissal of the indictment is with prejudice, unless the Ninth Circuit decides otherwise and remands the case or some part of it for trial." (RT 5/12/76. p. 8)

[36] Petitioner spawns a red herring when it alleges a need to appeal

must begin anew after a voluntary dismissal.[37,38]

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respondents' "legally erroneous" motions. Its effort to blame them for all the delay is neither factually nor logically accurate. (Pet. Brief 16)

The only reason that the case was dismissed in 1976 was that the petitioner refused to proceed to trial. Respondents wanted their trial, but had no option but to move to dismiss. That motion has been upheld as "legally correct" by every court that has reviewed it. It was only the "with prejudice" aspect of the dismissal that was overturned—and that for an alleged deficiency on the part of the trial judge, not of respondents.

[37] In *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir., 1972), a defendant's motion to dismiss was allowed, and a Government appeal ensued. Nine months later, the District Court dismissal was affirmed. Three months thereafter, the Government reindicted. The Court referred to the *three month interval* between affirmance of dismissal and reindictment as "* * * the period between the end of one prosecution and the beginning of another * * * [during which] he 'suffers no restraints on his liberty and is not the subject of public accusation.' " 463 F.2d at 891. The Court therefore held that the first prosecution was not at an end until the Court of Appeals affirmed the District Court's dismissal. *Bishton* is *specifically* referred to by the *MacDonald* Court. 456 U.S. at 8, fn.7.

[38] Petitioner, in its footnote 22, reads the same *MacDonald* footnote in which this Court cited *Bishton* as "indicat[ing] its intent that the holding apply to all dismissals. * * *" It bases this argument on the assumption that "18 U.S.C. § 3161(d)," cited therein, refers to both its subsections. (Section 3161 [d] contains two subsections. Subsection [d][1] addresses the timing of a trial upon recharging. Subsection [d][2] addresses the timing of a trial following reinstatement of a dismissed indictment on appeal.) A close examination of the Government's brief on the merits in *MacDonald* shows language closely resembling the *MacDonald* footnote. It is clear that only subsection (d)(1) was material to the Government's argument. (See *MacDonald* Pet. Brief 16-17, 31 [especially footnote 24].)

Thus, even though *MacDonald*'s footnote 7 can be read as including both subsections of § 3161 (d), it can also be read as limited to subsection (1). Furthermore, it should be noted that the operation of § 3161(h)(6) cited in that footnote is consistent with the holding of the

9. The Trial Court Considered Respondents' Strong Desire For A Speedy Trial When Deciding Release Restrictions During The Technical Dismissal. To Focus On The Severity Of Restrictions Rather Than Their Nature Punishes Respondents For Wanting A Speedy Trial.

Considerations of the differences between *MacDonald* and *Loud Hawk* aside, the inverse correlation the Government seeks to create between the severity of release restriction and the protection afforded by the Sixth Amendment cannot withstand scrutiny. (Pet. Brief 34)

First, *Klopfer*, *supra*, unquestionably rejects such a correlation. 386 U.S. at 220. As *MacDonald*, *supra* (456 U.S. at 8-9) and *Moore*, *supra* make clear, it is the nature of the disabilities any accused suffers, rather than the severity of these disabilities, that engages the Sixth Amendment.

Respondents readily admit that their release conditions could have been more severe (they could have been required to post bail—or in fact, could have been incarcerated). To strip them of their Sixth Amendment rights because of this fact would go against one of the most basic concerns of the speedy trial right: a defendants' desire for a speedy trial. See *Barker*, *supra*, 407 U.S. at 531-532, 534-536.

When this case was dismissed in 1976, respondents stood ready for trial, *demanding* their speedy trial. It was *petitioner* that refused to proceed. The District Court knew that respondents wanted to go to trial. He knew that they would want to and have to keep in contact with counsel while the case was on appeal. He released them in a manner consistent with their desire for a speedy trial, and his knowledge that they would reappear if need be.

It must also be remembered that the relationship between the parties has been characterized by the Government as "acri-

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Court of Appeals in *Loud Hawk*. See Judge Redden's opinion at Pet. App. 127a.

monious." (CR R-74) (J.A.60) (See also: Pet. App. 35a) Respondents have always been aware of the havoc that even a minor transgression of the law would cause in their lives. They would be ORDERED to appear in the United States District Court for the District of Oregon to argue against a Government request for bail on these "dismissed" charges. This is an advocacy of astonishing public policy for the Government to insist that the Sixth Amendment only affords protection to those pretrial appellees who break the law, do not want a speedy trial, or otherwise give cause for the imposition of tougher release restrictions during appeal.[39]

In sum, respondents have remained formally accused and subject to disabilities on their liberty commensurate with their status of pretrial defendants despite the technical dismissal of the indictment against them.[40] Petitioner admitted as much when it sought bail restrictions while it appealed the dismissal that it engineered. That it now takes a contrary position merely reflects its compulsive purpose.

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[39] The Government's argument, were it to prevail, would create a most anomalous situation. District judges might impose bail restrictions on people they would fully intend to release so that the individual would be protected under the Sixth Amendment in case the Government's appeal of the dismissal order took an inordinate amount of time.

[40] When the charges were reinstated in 1979 (and again in 1983 for KaMook Banks), it was as if they were never dismissed. The appeal served to stay the effect of the District Court dismissal order. Because that order was overturned, it never went into effect.

As all parties agreed, motions that had been filed and not ruled upon in 1976 were considered "pending" from that time. (See footnote 11, *supra*) The practical effect of a ruling overturning a dismissal and reinstating an indictment is as though the dismissal never occurred. (Pet. App. 128a) The indictment is not renewed, it is reinstated. The Sixth Amendment must therefore apply.

C. WHEN A SUPPRESSION ORDER IS ENTERED AGAINST THE GOVERNMENT WITH RESPECT TO ONLY ONE PART OF A CRIMINAL CASE, THE GOVERNMENT CANNOT CONTUMACIOUSLY REFUSE TO PROCEED TO TRIAL ON THE UNAFFECTED COUNTS AFTER BEING DENIED A STAY BY BOTH THE TRIAL AND APPELLATE BENCHES, AND SUFFER NO CONSEQUENCE UNDER *BARKER* V. *WINGO* FOR SUCH RECALCITRANCE.

To fully appreciate the injustice that would result if the time during which this indictment was technically dismissed were removed from Sixth Amendment scrutiny, one has to put oneself in the common position of the trial court and respondents in May of 1976.

In late March of 1976, Judge Belloni had suppressed all evidence material to alleged "dynamite." (CR 91, J.A. 48) Despite the May 12th trial date, the Government did not notice an appeal of that suppression order until the third week of April. It then requested a continuance of the trial date.

Because the suppressed evidence was not a "substantial proof of a fact material" (18 U.S.C. §3731) to the remaining firearms charges, Judge Belloni denied the continuance request. Of course, if respondents did not want a speedy trial (as petitioner wants this Court to believe), they would have acquiesced in the Government's request for an open-ended postponement. Rather, as Judge Belloni was well aware, their defense was aided by a large *ad hoc* volunteer effort. He fully understood the difficulties that these indigent respondents feared from a set-over.

Rather than give respondents the speedy trial the Government admitted they desired (CR 134, J.A. 51), or accede to the wishes of the District Court to proceed with the trial, petitioner asked the Ninth Circuit to order a stay. (J.A. 1) Respondents, rather than taking this second opportunity to postpone trial indefinitely, filed a vigorous objection to the Government's request, relying strongly on their right to a speedy trial. (J.A. 162)

A little more than two weeks before the trial date, the prosecution informed the Court and respondents that it probably would not proceed to trial on May 12th, even if ordered to do so:

> THE COURT: * * * [L]et's pin this down; if the trial date of May 12th still stands because the Court of Appeals has refused to change it, then on that morning when the case is called for trial, there will be no jury needed because there will be a motion by the Government to dismiss?
>
> MR. TURNER: No, Your Honor, I don't think so, because if we moved to dismiss—and I haven't really clarified this in my own mind, but I believe our present position is that if we move to dismiss, that would moot the appeal before the Ninth Circuit. I think that probably there would have to be a motion by the Court on its own or by counsel for the defendants to dismiss for want of prosecution.
>
> THE COURT: Yes. All right.
>
> MR. TURNER: And that is to the indictment, for the Government's failure to proceed as ordered by the Court. That would keep alive our appellate rights before the Ninth Circuit. My present feeling is that we would be ill advised to move on our own to dismiss the indictment on May 12th.

(RT 4/26/76 pps. 6-7, J.A.53)

The Ninth Circuit denied the stay request. (J.A. 1) Despite respondents' demand for trial and the District Court's Order for that trial, petitioner moved for continuances until the eve of May 12th. (CR 136, CR 139, J.A. 51)

When respondents appeared ready for their trial, and the Government refused to proceed, they had no option but to move to dismiss. The Court had no choice but to grant that dismissal motion. (See Pet. App. 150a) Had respondents' opposition to a continuance been less forceful, the Government's request might have been granted. The indictment would not have been dismissed. In that circumstance the Speedy Trial Clause unquestionably would have applied during the Government's

appeal. Respondents should not be denied the protection of the Sixth Amendment because they insisted on their speedy trial so strongly.

D. THE APPELLATE COURT CORRECTLY UPHELD THE THE DISTRICT COURT'S USE OF DISCRETION IN APPLYING THE ANALYSIS OF *BARKER* V. *WINGO* TO THE UNIQUE FACTS OF THiS DECADE-OLD CASE AND THEREIN FINDING A CLEAR SPEEDY TRIAL VIOLATION.

The Court of Appeals correctly upheld the District Court's finding that respondents' rights to a speedy trial had been violated. In fact, it held that the *Barker* balance tipped "sharply" in respondents' favor. (Pet. App. 18a)

LENGTH OF DELAY

As exhaustively discussed above, the Court of Appeals was correct in calculating "the delay in this case as ninety months, the period from the arrest of defendants until their indictment was last dismissed on May 20, 1983." (Pet. App. 11a) Clearly this delay was sufficient to "trigger" further inquiry.

REASONS FOR THE DELAY

Barker, supra, defines how to weigh the reasons for any particular delay in the balance of factors:

> * * * [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531 The Court of Appeals weighed the reasons for delay as follows:

For the first pretrial appeal it separated the dynamite and non-dynamite counts. It concluded that the delay attendant on appeal of the latter was "wholly unnecessary" and weighed "heavily" against the Government.

As to the dynamite counts, the Court properly found that "[t]he Government's action in taking the appeal was therefore clearly justified, and would of itself support a reasonable delay. The problem is that this appeal took forty-six months." Although a shorter period of time might have been found justifiable for a pretrial, "expedited" appeal, clearly a nearly four year delay was neither "appropriate" nor justified. Such delay falls into the "neutral" *Barker* pigeonhole, and thus weighs against the Government, but less heavily. (Pet. App. 13a)

The delay attendant to the second appeal was considered justified by the Court of Appeals. It further found that six months of delay were the fault of respondents, and thus balanced the reason for the delay against a period of twenty-three instead of against twenty-nine months. It considered a twenty-three month period for a pretrial interlocutory appeal to be not "undue," and therefore did not weigh this factor in the balance. (Pet. App. 15a)

ASSERTION OF THE RIGHT TO A SPEEDY TRIAL.

More than by anything else, the antique nature of this lawsuit is revealed by the Government's assertion that respondents did not want a speedy trial. This case is so old that its revisionist history is already being written.

To "support" this claim, the Government faults defendants for requesting two short trial court continuances in early 1976. (Pet. Brief 42) These continuances were sought either to allow all defendants to be tried together, or to allow time for defense investigative efforts, stymied by the Government's instruction to witnesses to refrain from talking with the defense. Respondents made a total of two continuance requests, the last being in February, 1976, setting trial for May 12, 1976—the date on

which the **Government** refused to proceed to trial.[41] (CR 62, J.A. 46)

Petitioner suggests that respondents' demand for trial on May 12, 1976, was "purely gratuitous and pro forma"[42] because "the government had already clearly stated that it would not proceed to trial on that date because of the pending appeal * * * and respondents therefore knew that they would not be going to trial at that time." (Pet. Brief 4) Of course, no mention is made of respondents' fervent opposition to the Government's request for continuances. (See J.A. 162) Nor does petitioner mention that that continuing and vehement opposition began well before the Government announced that it would violate court orders and not proceed to trial.[43]

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[41] The 1980 continuances referred to at Pet. Brief 42 were not continuances of the trial date, but of motion or hearing dates well in advance of the scheduled trial. The Government also sought such extensions. (CR R-91, J.A. 63; RT 5/12/80 p. 14)

[42] Once out of custody (and laboring under their designation by the Government as "high risk" defendants pursuant to the District of Oregon's Plan for Prompt Disposition of Criminal Cases, Section 12[b]) respondents were busy organizing their defense in anticipation of trial. (See attachments to CR 138, J.A. 51.) Less than three weeks before the trial date, they petitioned the Court to hold the trial "in a facility sufficiently large to accommodate a reasonable number of members of the general public," since this case had attracted national attention and Indian people were coming to attend from all over the country. (CR 132, J.A. 50) The defendants firmly believed that the Government's case against them was riddled with misconduct and racism, and the Government knew that defendants were eager to put those charges before a jury. (See statements of Russ Redner at Brief in Opposition, page 52 [citing RT 12/19/75 pps. 44-45, RT 1/23/76 pps. 51-52].)

[43] For example:

> MR. YOUNGMAN: * * * I would like to take this time, Your Honor, to advise the Court that Mr. [Tommy] Hawk will no longer represent the Government on the case. Mr. Hawk feels that since the Government is going to appeal the Court's sup-

No court has ever charged defendants with seeking delay; every court that has ever had the opportunity to rule on the Government's irresponsible refusal to proceed to trial (despite denial of a request for stay by both trial and appellate benches) has laid responsibility for unnecessary delay at the U.S. Attorney's doorstep.[44]

When the Government requested delay, respondents opposed it. When the appellate bench was considering the request for a stay, a vigorous objection was filed. (J.A. 162) (See

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pression motion, that the trial might be put over until the late fall, in which case Mr. Hawk has other plans.

THE COURT: Who will be representing the Government?

MR. YOUNGMAN: Your Honor, I will and Mr. Turner.

THE COURT: All right. Good morning, Mr. Roberts.

MR. ROBERTS: Good morning, Your Honor. If I might address myself just briefly to the last statement, I'd like the record to reflect both my client's, my own, and co-defendants' strenuous opposition to any continuance of this trial. We're ready to go to trial, we want to go to trial on May 12th, we're prepared for trial, and we want to go.

THE COURT: There has been no motion for continuance, and I also intend to try the case on May 12th.

MR. ROBERTS: Thank you, Your Honor.

(RT 4/13/76 pps. 2-3 (*Cf. Manley* v. *Ryan*, 604 F. Supp. 404, 406 [M.D. Penn., 1985]: "This Court would be more receptive to Petitioner's application were there some record that he had asserted this right contemporaneously with the Commonwealth's motion for extension of time to commence trial.")

[44] Petitioner suggests that respondents did not want a speedy trial because they did not "press" the Ninth Circuit to act more quickly. But as petitioner well knows, once a case has been expedited under court rules (as all the appeals in this case were), there is nothing either party can do to speed up the process. With the exception of procedures for one-day appellate disposition of frivolous appeals (which were clearly inapplicable to this case—see Pet. Brief 42, and discussion of *United States* v. *Burt*, 619 F.2d 831 [9th Cir., 1980] at RT 8/12/80 pps. 190-191), procedures like those of Ninth Circuit Rule 20 merely crack a whip under counsel and court reporters. They do not address the years that a case can languish "under submission."

also FCR 1048) Nine years after the fact, the Government asserts that respondents did not want a speedy trial, yet only eight days before the May 12, 1976, trial date, the Government admitted that "the defendants [and] their counsel. . . desire the case to be tried at the earliest practicable opportunity." (CR 136, [FCR 810], J.A. 51) On the date set for trial, Judge Belloni found that the defendants were ready. (RT 5/12/76) After every remand, defendants reasserted their claim. (Pet. App. 135a)

Clearly, there was no error by either District or Circuit Court giving respondents' demands for a speedy trial "strong evidentiary weight." *Ibid.*, quoting *Barker*, *supra*, 407 U.S. at 531.

PREJUDICE.

There are two types of prejudice relevant to a speedy trial question: " * * * prejudice to the person and prejudice to the defense." *Dufield* v. *Perrin*, 470 F.Supp. 687, 691 (D.N.H., 1979)

Regarding the former, respondents have had these unresolved charges hanging above their respective heads like a sword of Damocles for nearly a decade. The District and Circuit Courts both found that respondents have suffered personal prejudice from the outrageous length of delay. (Pet. App. 16a, 136a)

Although a showing of prejudice to the defense is not an essential element of a successful Sixth Amendment claim,[45] respondents have made such a showing. Judge Redden found that material defense witnesses had died, and other material witnesses had lost all recollection of the events of November,

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[45] See *Moore* v. *Arizona*, *supra*, 414 U.S. at 26; *MacDonald*, *supra*, 456 U.S. at 8.

1975.[46,47] The Government had ample opportunity in the District Court to contest respondents' showing of "obvious" prejudice to the defense. It chose not to do so.

This case is almost a decade old—twice the statute of limitations. Prejudice to the defense, which need not be affirmatively demonstrated (but was) can even be presumed when the delay is this extensive. See *United States* v. *Vispi*, 545 F.2d 328, 334 fn. 7 (2nd Cir., 1976). See also *People* v. *Johnson*, 162 Cal. Rptr. 431, 606 P.2d 738, 749 (1980) (In Bank) and *Hodges* v. *United States*, 408 F.2d 543, 550 (8th Cir., 1969). In fact, when a defendant's claim "* * * has *prima facie* merit, the Government must make a showing which 'convincingly outweighs' a defen-

[46] Two people had seen the vehicles described by the FBI teletype on November 14, 1975, and been shown "throw downs" days after respondents' arrest. Both had opportunities to see occupants of the vehicles. None of the respondents was identified, although two other people were, according to the reports of the officers. These witnesses no longer have any recollection. (Pet. App. 137a)

[47] A sampling of the other prejudice in the record that the Courts did not mention in their opinions includes: 1) Respondents have been prejudiced by a change in public attitudes. (CR R-214, J.A. 100); *United States* v. *New Buffalo*, 600 F.2d. 368, 379 (2nd Cir., 1979); 2) Tape recordings of calls by material witnesses have been destroyed. (CR R-242, J.A. 102) *Dickey, supra*, 398 U.S. at 32, *Murray* v. *Wainwright*, 450 F.2d 465, 472 (5th Cir. 1971); 3) KaMook Banks, who successfully completed probation on an unrelated charge, can no longer have the possibility of concurrent sentences if convicted. *Dufield, supra*, 470 F. Supp. at 691; *United States* v. *Graham*, 538 F.2d 261, 265 (9th Cir., 1976); *Prince* v. *State of Alabama*, 507 F.2d 693, 707 (5th Cir., 1975) See also *United States* v. *Salzmann*, 417 F. Supp. 1139, 1144, 1164, 1168, 1169 (E.D.N.Y., 1976), *aff'd*,548 F.2d 211 (2nd Cir., 1977); *Smith* v. *Hooey, supra*, 393 U.S. at 378; 4) KaMook Banks and Kenneth Loud Hawk would have been eligible for Youthful Offender treatment and no longer are. *United States* v. *Black*, 416 F. Supp. 59, 62 (M.D. Fl., 1976), *aff'd* 548 F.2d 395 (2nd Cir., 1976); *Salzmann, supra*, 417 F. Supp. at 1173.

dant's assertion of prejudice." *Parks* v. *United States*, 451 A.2d 591, 602 (1982)[48]

THE BALANCE

The Government misses the mark when it states that the lower courts "gave virtually dispositive force" to the length of delay. (Pet. Brief 36, fn. 23) The District and Circuit Courts did not ascribe inordinate weight to the length of delay; rather the length of delay in this case is inordinate.[49]

[48] Judge Redden also found a due process violation resulting from the delay, and dismissed the indictment on that alternative basis. (Pet. App. 135a-138a) The Court of Appeals did not specifically address that part of the dismissal order, as it found a speedy trial violation. However, petitioner suggests (Pet. Brief 43, fn. 26) that "it would be appropriate for this Court to rule that there was no due process violation."

Judge Redden was correct in finding a due process violation as well. Petitioner points to no findings of fact that it believes are clearly erroneous. A bald assertion of error, without any showing to combat all the presumptions in favor of a correct application of discretion by a trial court, is not persuasive. See, e.g., *United States* v. *Hart*, 546 F.2d 798, 801-802 (9th Cir., 1976) ("clearly erroneous" standard of review of any pure or mixed findings of fact); *United States* v. *Mills*, 641 F.2d 785, 787 (9th Cir., 1981), *cert. denied*, 454 U.S. 902, 102 S.Ct. 409 ("abuse of discretion" standard of review in speedy trial cases).

[49] The longer the delay, the heavier that factor weighs in the balance. *United States* v. *Macino*, 486 F.2d 750, 752 (7th Cir., 1973); *United States* v. *Holt*, 448 F.2d 1108, 1109 (D.C. Cir., 1971), *cert. denied* 404 U.S. 942.

If four and one-half years is "substantial" (*United States* v. *New Buffalo*, 600 F.2d 368 [2nd Cir., 1979]), five years is "extraordinary" (*Barker, supra*), and six years is a "judicial catastrophe" (*United States* v. *Blanca Perez*, 310 F. Supp. 550 [S.D.N.Y., 1970]) then a seven and one-half year delay must at least be "unconscionable," and accordingly weighed.

Respondents suffered concrete and substantial prejudice to their case and their lives from this unconscionable delay. They have consistently demanded a speedy trial, and have opposed all Government attempts to delay, starting with their insistence on a trial in 1976.

Furthermore, the delay resulting from the Government's refusal to abide by court orders to try this case, and its improper appeal, was wholly unnecessary. The delay from the Ninth Circuit's consideration of the other proper appeals was too long to be justified. Six years is not an appropriate delay for determination of one- and two-issue appeals.

Since each of the *Barker* factors weighed in support of respondents' speedy trial assertion, the Circuit Court was correct in sustaining Judge Redden's ORDER finding a Sixth Amendment deprivation. The *Barker* scales do tip "sharply" in respondents' favor.

In sum, there can be no abuse of discretion in dismissing an indictment under *Barker* where, *inter alia:*

1) Over seven-and-one-half years of delay is at issue;

2) Four years of delay weighs heavily against the Government because of its refusal to proceed to trial and its improper appeal;

3) Material witnesses have died or have lost all recollection of the events of November, 1975, and respondents have been personally prejudiced with disabilities imposed by the pendency of this prosecution; and

4) The record and close dealing with the parties convinced the District Court that it was the defendants and not the prosecution that has continually desired a speedy trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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